to suppress the evidence obtained from the search of the Ford were overruled by the trial judge (R. 11) and that evidence was admitted over objection of the defendants at the trial. (R. 57) Verdicts were directed in favor of all defendants as to count one, and, as to the petitioner and Forks, as to count two (R. 73-74), Wright was found guilty by the jury on the second count; and, all three, including the petitioner, were found guilty on the third count. (R. 5) The petitioner was sentenced to two years imprisonment on the third count. (R. 5) They appealed from the judgment to the Court of Appeals of Maryland. The Court of Appeals of Maryland affirmed the judgment on April 12, 1960. The defendants filed a motion for rehearing on April 27, 1960 and their motion was denied on May 19, 1960. Petitioner applied to this Court for an extension of time within which to file this petition and Mr. Justice Black ordered the time extended to and including October 15, 1960.

HOW THE FEDERAL QUESTIONS WERE RAISED

1. The illegality of petitioner's arrest, the unlawfulness of the search and seizure based upon and flowing from the illegal arrest and the inadmissibility of the evidence obtained from that search and seizure, were raised by petitioner by a Motion to Suppress the Evidence made prior to trial (R. 10-11) and denied (R. 57) at the trial, by objection to the admissibility of the evidence (R. 57) and by motions for directed verdict at the end of the trial. (R. 71-72)

2. The same questions were raised by petitioner in the Court of Appeals of Maryland by brief and argument and by Motion for Rehearing. (R. 88-89)

3. The Court of Appeals of Maryland assumed (without deciding) that the arrest of petitioner was illegal but held that the evidence obtained by the search and seizure pursuant to the search warrant was admissible notwith-

standing the search warrant was based upon and flowed from the illegal arrest (Appendix A pp A1-A6), and thus denied the federal claims put forward by the petitioner.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals of Maryland would permit a police officer, upon mere suspicion of a misdemeanor, to arrest anyone upon the public streets, and while holding that person, to search property near the victim; albeit with a search warrant, and if evidence of an offense happened to be found, to use that evidence to convict the person of a crime without any showing of the relation of the person to the property searched and seized. Certainly, such an abuse amounts to an unconstitutional deprivation of the liberty of the citizen and a denial of due process of law.

The "rogue and vagabond" statute of Maryland proscribes the possession of burglar's tools with an intent to break and enter feloniously a dwelling house, warehouse or store house. Annotated Code of Maryland, Article 27, section 490. In Maryland, this offense is regarded as a misdemeanor. *Bowser* v. *State*, 136 Md. 342, 110 A 854. An officer may not make an arrest for a misdemeanor not committed in his presence and a citizen may not be arrested upon mere suspicion of having committed a misdemeanor. *Davids* v. *State*, 208 Md. 377, 118 A2d 636. Such a police incursion into privacy by a state officer is contrary to the protections of the Fourteenth Amendment, *Wolf* v. *Colorado*, 338 U.S. 25, 28, and the arrest may not be justified by what a subsequent search discloses, *Henry* v. *United States*, 361 U.S. 98.

The arrest of the petitioner was clearly illegal. No one saw him do anything wrong; no one saw him violate any law; no one saw him with anyone who did anything wrong; no one showed any relationship to, connection with, or acquaintance of the petitioner with anyone else.

doing anything wrong or in violation of the law. There just was no reason for petitioner being arrested. He was not identified as the man with Wright, a co-defendant, in the alley or near the warehouse. He was seen on a well lighted public street 70 feet away from the point where Wright was arrested by Officer Gibson. He did not run, walk away or do anything to create even a suspicion other than walk toward a telephone pole. The Court of Appeals in its opinion assumed without deciding that "the tests of the validity of an arrest for a misdemeanor made without a warrant were not met". Indeed, there was no need for the Court to decide that issue; it was perfectly obvious without decision. The arrest of the petitioner was a clear violation of his constitutional rights under the Fourteenth Amendment. *Wolf* v. *United States*, *supra*.

Because the petitioner was illegally arrested near a Ford automobile with which he is not shown to have any connection, whatsoever, the police officers conducted a search of that automobile pursuant to a search warrant. And because burglar's tools were found in that automobile, quite irrespective of the absence of any connection of petitioner to the Ford, its owner, and its user and regardless of any lack of knowledge or control of the contents of the Ford, the petitioner's arrest is justified and he is convicted of possessing burglar's tools by way of being deemed a "rogue and vagabond". The search warrant was based upon and flowed from the illegal arrest and was tainted with the same illegality. If there had been no arrest, the search would not have followed.

The validity of the seizure must depend on the validity of the arrest which it followed and it acquired nothing from the search warrant based on the illegal arrest.

The Court of Appeals considered the search and seizure as occurring in execution of a search warrant rather than as an incident of the arrest. Actually, the police made a

search and seizure on the scene at the time of the arrest or while the petitioner was held for investigation and uncharged. The application for search warrant (R. 6) and the search and seizure warrant (R. 7) both state the arrest of petitioner and the taking of the Ford into police custody on the night of August 27th. Police officers, after confining petitioner, went immediately back to the scene of arrest and inspected petitioner's Oldsmobile and the Ford. (R. 47) The Ford was a convertible with the top down. (R. 39) The registration card in the name of one Nathan Bartell, not a party in this case, and a card addressed to defendant Wright's wife, were found in the glove compartment. (R. 58) There was no connection of the Ford to the petitioner other than the fact that he stood near it when he was arrested. Having already seized the Ford and connecting it to Wright, the police the next day obtained a search warrant. It is submitted that this action was only an attempt to regularize what they had unlawfully done the night before incident to an illegal arrest.

It is significant that Officer Clayton who made the Affidavit and Request for Search Warrant stated the Ford automobile was observed parked nearby at the time *an arrest was made by other officers of two individuals in the act of breaking into the warehouse.* (R. 6-7) The testimony at the trial, including the testimony of Clayton shows this is not the fact at all. Further in the affidavit there is recitation about his receiving a description of an individual *fleeing from the alley* later identified as Forkes. (R. 7) but no evidence at trial showed anyone fleeing anywhere and no such person was identified by anyone. Apparently, the search warrant was not sought in haste. (R. 68) and there is no reason for such material misstatements of the facts other than to regularize what the police already knew by their custody of the car from the time of the arrest until 4:00 p.m. the following day.

Petitioner believes that, in view of *Wolf* v. *Colorado*, 338 U.S. 25, as interpreted and applied in *Elkins* v. *United States*, 364 U.S. 206, the invasion of his rights was such as to constitute a violation of the Fourteenth Amendment's standard of due process of law.

Under the decision of the Court of Appeals, any innocent citizen of the City of Cumberland who happened to stop on the public sidewalk next to the Ford automobile could have been, with equal reason and justice, arrested. And having been arrested, he too, no matter how blameless, could under this decision have been convicted of being a "rogue and vagabond" because the Ford there parked when searched happened to contain burglar's tools.

CONCLUSION

The decision below is erroneous. It contravenes petitioner's right to due process of law. The present petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

RICHARD H. LOVE
1010 Vermont Avenue, N.W.
Washington 5, D. C.
Counsel for Petitioner.

October 1960.

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 188

ALBERT WRIGHT, ANDREW FORKES and CHARLES ISAACS

v.

STATE OF MARYLAND

Edward J. Ryan and William L. Wilson, Cumberland, for appellants.

Robert C. Murphy, Sp. Asst. Atty. Gen. (C. Ferdinand Sybert, Atty. Gen., and James S. Getty, State's Atty., for Allegany County, Donald W. Mason, Asst. State's Atty., for Allegany County, Cumberland, on the brief), for appellee.

Before BRUNE, C. J., and HENDERSON, HAMMOND, PRESCOTT and HORNEY, JJ.

BRUNE, Chief Judge.

The three defendants, Wright, Forkes and Isaacs were tried in the Circuit Court for Allegany County on a three-count joint indictment charging them with: (1st count) conspiracy to break and enter the storehouse of Montgomery Ward & Co. in Cumberland; (2nd count) attempting to break and enter said storehouse; and (3rd count) with being "rogues and vagabonds" under Code (1957), Art. 27, Sec. 490. Verdicts were directed in favor of all three on the first count and in favor of Forkes and Isaacs on the second count. Wright was found guilty by the jury on the second count, and all three were so found guilty on the third. They appeal from the judgments entered against them on all of these convictions. Each

was sentenced to two years' imprisonment on the third count, and Wright was also sentenced to two years on the second.

In their brief the appellants contend first, that they were illegally arrested and, second, that evidence obtained by search following their arrest was inadmissible. They filed a motion to suppress such evidence, which was granted in part and overruled in part. At the end of the trial the defendants submitted motions for directed verdicts, and in argument (but not in their brief) in this Court they have also challenged the sufficiency of the evidence.

At or about ten P.M. on August 27, 1959, Officer Gibson, of the Cumberland Police, saw two men about three hundred feet away from him walking along a street towards a blind alley in the rear of the Montgomery Ward warehouse and other buildings. This alley comes to a dead-end at some railroad tracks. Following the tracks, the officer entered at that end of it and saw the defendant Wright standing in the alley at the Montgomery Ward loading dock. The warehouse was closed, and so were the stores in the neighborhood. The streets were deserted, but a bingo game was in progress in one building backing on the alley. The officer went over to Wright and asked him what he was doing in the alley. He also inquired as to his identity. Not being satisfied with Wright's answers, which were in part contradictory, Officer Gibson took him to a police call box. En route he saw another man (later found to be the defendant Isaacs) standing near a brightly lighted announcement sign on a church near the entrance to the alley from which position he could observe the alley. This man promptly moved into the shadow of a telephone pole.

Officer Gibson telephoned for another officer to come to take Wright to the police station "for investigation." Officer Clayton responded, to whom Officer Gibson gave his

a description of Isaacs. Officer Gibson then returned to the Montgomery Ward loading dock and rear entrance and found a large screwdriver sticking in the lock of the door and some gloves and a small screwdriver and a flash light nearby. None of these had been there when the officer checked the area on his rounds two hours earlier.

Officer Clayton returned to the alley and talked further with Officer Gibson. He then cruised about the area until he found a man answering the description which Officer Gibson had given him of Isaacs. Isaacs was standing by a Ford automobile talking with another man, Forkes. An Oldsmobile was parked across the street from it, headed in the opposite direction. Officer Clayton asked Isaacs and Forkes if they had a car, and they said that they did but they did not indicate that it was either the Ford or the Oldsmobile, or that they had any connection with either of those cars. Officer Clayton took them both in to the police station, where Officer Gibson identified Isaacs as the man he had seen stepping into the shadow of the pole at the entrance to the blind alley. The three men were questioned by the police officers, but little of what they said was admitted into evidence.

At the police station Isaacs said that the Oldsmobile was his, and a subsequent check of the license records of the State in which it was registered showed that it was registered in the name of his wife. Evidence found as a result of a search of this car was excluded. The Ford carried license plates from the same State as the Oldsmobile, and Isaacs and Forkes had been found standing beside it. A witness who testified at the trial worked in a building very close to where the two cars were parked. He saw Isaacs and Forkes standing by the Oldsmobile, saw them cross the street to the Ford and saw one of them get in the Ford. He saw them both standing beside it when the police cruiser drew up, just before they were taken off in the cruiser. Just when he gave this information to the police does not appear.

The police searched the Ford to some extent, in addition to searching the Oldsmobile. In the unlocked glove compartment of the Ford they found an unmailed letter addressed to Wright's wife. The trunk was locked and they had no keys to it. This car was removed to police headquarters and the next day the police obtained a search warrant from a justice of the peace to search the Ford. As a result of the search they found sundry burglar's tools and two pistols in the trunk of the Ford. Over objection of the defendants the results of this search were admitted into evidence.

We may assume (without deciding) for the purposes of this case that the tests of the validity of an arrest for a misdemeanor made without a warrant were not met as to any of the defendants at the respective times of their arrests. See Davids v. State, 208 Md. 377, 118 A.2d 636. Illegality of the arrests would not, however, prevent the defendants from being validly indicted and tried. Martin v. State, 203 Md. 66, 98 A.2d 8; Bryant v. Warden, 196 Md. 646, 74 A.2d 833, and cases therein cited.

The appellants' argument virtually ignores the effect of the search warrant. The burglar's tools, which constituted important evidence on the "rogue and vagabond" charge, found in the trunk of the Ford were found in the execution of that warrant, not during a search made as an incident of an unlawful arrest. Yet the arguments for the exclusion of this evidence seem to rest on the latter theory, in support of which they properly cite Davids v. State, supra; Le Fairve v. State, 208 Md. 52, 116 A.2d 368, 118 A.2d 639; and De Angelo v. State, 199 Md. 48, 85 A.2d 468. Each of those cases differs from the instant case. In Le Fairve there was no search warrant at all. In Davids there was a right to search under the Alcoholic Beverage Law, but Davids had done nothing to warrant his arrest and a search of his person. In

Angelo was somewhat similar to Davids in this respect. The defendant came into a house which was in course of being searched under a warrant. It was held, however, that the warrant, though it authorized the arrest of anyone participating in the lottery at the premises in question, did not authorize the arrest of De Angelo. He had done nothing and had said nothing in the presence of the officers to show that he was participating in the lottery or that he was doing anything to justify his arrest. His arrest was held illegal, the search of his person in connection therewith was held unlawful and the evidence obtained by that search was held inadmissible under the Bouse Act, then as now codified as Sec. 5 of Article 35 of the Code. That evidence was not obtained in the valid execution of a search warrant.

In the instant case, the evidence which the appellants sought to exclude (both by motion to quash or to suppress and by timely objection) was not found as a result of a search made in the course of their arrest. It was made under the warrant. The fact that the search under the warrant was made without their consent seems quite immaterial, for the validity of the warrant and the right to search thereunder were not dependent upon the appellants' consent. Martini v. State, 200 Md. 609, 92 A.2d 456.

The appellants do not challenge the affidavit as insufficient on its face to show probable cause, and its sufficiency is to be tested on the basis of the allegations therein set forth. Burrell v. State, 207 Md. 278, 113 A.2d 884; Tischler v. State, 206 Md. 386, 111 A.2d 655; Smith v. State, 194 Md. 329, 62 A.2d 287, 3 A.L.R. 2d 386. Nor do they challenge the warrant for non-compliance with statutory requirements. See Code (1959 Supp.), Art. 27, Sec. 551. Cf. Goodman v. State, 178 Md. 1, 11 A.2d 635; Riley v. State, 179 Md. 304, 18 A.2d 583.

This case was tried before a jury. To overturn the judgment in this Court for insufficiency of the evidence against any or all of the appellants, it would be necessary to show that there was no legally sufficient evidence from which the jury could find such defendant or defendants guilty beyond a reasonable doubt. See Johnson v. State, 221 Md. 177, 156 A.2d 441; Judy v. State, 218 Md. 168, 146 A.2d 29; Mazer v. State, 212 Md. 60, 127 A.2d 630. Our review of the evidence leads us to the conclusion that the jury could find therefrom that all three of the defendants were associated together in the possession of the burglar's tools found in the trunk of the Ford. See Kay v. State, 167 Md. 218, 173 A. 246; Bevans v. State, 180 Md. 443, 24 A.2d 792. We also think that the jury could properly find from the evidence that the defendants possessed these tools at a place and under circumstances from which an intent to break and enter feloniously a dwelling house, warehouse or storehouse could be presumed, in violation of the "rogue and vagabond" statute, Sec. 490 of Article 27 of the Code. See Martini v. State, supra; Goldstein v. State, 179 Md. 697, 22 A.2d 471. We also think that the evidence of Wright's presence at the loading dock and of the finding of the screwdriver in the lock of the door and of another screwdriver, a flashlight and gloves there a few minutes after Wright's arrest was enough to warrant the jury in finding him guilty of attempting to break and enter the storehouse in question.

Judgments affirmed, with costs.

APPENDIX B

JUDGMENT BELOW

In the Court of Appeals of Maryland there is no separate document called a judgment. The opinion and the docket entries on the Mandate thereon constitute the judgment.

The docket entries on the Mandate in the present case are as follows:

MANDATE
COURT OF APPEALS OF MARYLAND

No. 188, September Term 1959

CHARLES ISAACS

vs.

STATE OF MARYLAND

Appeal from the Circuit Court for Allegany County.

Filed: December 15, 1959

April 12, 1960: Judgments affirmed with costs. Op. Brune, C. J.

April 27, 1960: Motion for Reargument filed.

May 19, 1960: Motion Denied